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Supreme Court U.S.
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No. 02-42

In The
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,

Petitioner,

v.

GILBERT P. HYATT AND THE EIGHTH JUDICIAL
DISTRICT COURT OF THE STATE OF NEVADA,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Nevada

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

In its Petition for Writ of Certiorari, the California Franchise Tax Board (Board) sought review of the order of the Nevada Supreme Court that refused to extend full faith and credit to California's statutory scheme that provides broad sovereign immunity to state agencies, officials and employees administering California's tax laws. The Board argued that *Nevada v. Hall*, 440 U.S. 410, 424 n.24, *reh'g denied*, 441 U.S. 917 (1979), suggested that in cases such as this case – where the order of the Nevada Supreme Court crippled California's capacity and ability to perform one of its core, critical sovereign functions, the enforcement of California's personal income tax law – even differing state policies would not justify denying full faith and credit to a sister State's body of law. The Board also argued that the States need guidance in the interpretation and application of the full faith and credit analysis in *Nevada v. Hall*.

In response, respondent Hyatt argued that the writ should be denied because a forum State need not extend full faith and credit where it has sufficient contacts with the lawsuit. Hyatt also argued that the Court has completely abandoned the use of a balancing test as part of its full faith and credit analysis. Finally, Hyatt argued that the States need no guidance from the Court on this issue. Hyatt is wrong on all counts.

ARGUMENT

I. Contrary to respondent's claim, the Full Faith and Credit Clause affords protection to non-forum sister States in resolving choice of law questions involving critical, core governmental functions.

Respondent's brief argues that the Full Faith and Credit Clause does not afford protection to non-forum sister States in resolving choice of law questions involving critical, core governmental functions. California and at least 37 other States and Territories have explicitly disagreed.

Respondent claims that a forum State, having sufficient contacts with the lawsuit, need not apply the law of another State when to do so would offend its own public policy without regard to the relative importance of the non-forum State's governmental function involved or the extensiveness of the contact between the forum and non-forum States.

Respondent also contends that the Court has abandoned any consideration of the relative importance of the governmental function and contact with the forum State in resolving these critical choice of law questions.

A. Despite the fact that a forum State has sufficient contacts with a lawsuit, it still must extend full faith and credit to the laws of a sister State engaged in core, critical sovereign functions.

Respondent's arguments are in part based on his interpretation of *Nevada v. Hall*, 440 U.S. 410 (1979), and in part by his reliance on a series of cases involving

actions between private parties. These cases between private parties are inapplicable because they do not involve the constitutional issue framed by footnote 24 in *Nevada v. Hall*. *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 232-33 (1998), involved a personal injury lawsuit between private parties. *Sun Oil Co. v. Wortman*, 486 U.S. 717, 733 (1988), and *Phillips Petroluem Co. v. Shutts*, 477 U.S. 797, 818-19 (1985), concerned private class actions over oil royalties. *Carroll v. Lanza*, 349 U.S. 408, 412 (1955), and *Pacific-Employers Ins. Co. v. Industrial Accident Commission of California*, 306 U.S. 493, 501-505 (1939), considered the issue of workmen's compensation amongst private parties. *Allstate Insurance Co. v. Hague*, 449 U.S. 302, 308 (1981), involved a wrongful death dispute between private parties.

Although *Nevada v. Hall* was a suit against a State, rather than exclusively between private parties, its result is also inapplicable here because it did not involve a State's exercise of a core, critical sovereign function. *Nevada v. Hall* revolved around a traffic accident by a Nevada state employee involving serious and substantial personal injuries that occurred on a public highway in California rather than the performance of a governmental function as this case does, a difference *Nevada v. Hall* recognized as potentially implicating different questions. In the case presently before the court, the auditor was the sole official of the Board charged with confirming respondent's claim of California non-residency status for California personal income tax purposes, a core, critical state function.[1]

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[1] Respondent seeks to influence and prejudice the Court against granting the Board's petition for certiorari by quoting and relying on

(Continued on following page)

Moreover, respondent's argument seeks to extend Nevada's judicial authority beyond its jurisdictional borders and to affect governmental policies and action elsewhere by exposing public agencies, officials and employees having no contact with the forum State to its judicial scrutiny and authority. Under respondent's argument official conduct that occurred exclusively in the non-forum State, and which was legal and immune from civil suit in the non-forum State at the time it occurred, would nonetheless be actionable in the forum State so long as it had an effect in the forum State.

B. Contrary to respondent's claim, use of a balancing test is called for where the non-forum State is engaged in core, critical sovereign functions.

Respondent claims that five Justices of this Court expressly disapproved the use of a balancing test in choice of law disputes under the Full Faith and Credit Clause in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981). The Board disagrees with that interpretation of *Allstate*.

As with the cases respondent relied upon above, *Allstate* deals only with private party litigants and does

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the testimony of a disgruntled former Board employee, Candace Les, who claims one of the Board auditors, Sheila Cox, was prejudiced against Hyatt because he is Jewish. Ms. Les was the subject of termination proceedings by the Board prior to the initiation of this lawsuit *and* the auditor *in question, Ms. Cox,* was the primary witness against her. See Board Response To Errata at 2. In any event, *neither* Candace Les nor Ms. Cox *made* the decision to audit respondent or the decision to issue a Notice of Proposed Assessment. See Illia Aff. ¶ 2, Cox Aff. ¶ 36 (Board Appendix Exh. 8).

not implicate the same constitutional concerns that are present here. Therefore, to the extent that *Allstate* establishes a rule disapproving use of a balancing test, the rule does not apply here. More importantly, however, Justice Stevens explicitly recognized in his concurring opinion in *Allstate* that the competing interests of the forum and non-forum States must be balanced to avoid infringement upon a State's sovereignty. "The Full Faith and Credit Clause implements this design by directing that a State, when acting as a forum for litigation having multistate aspects or implications, *respect the legitimate interests of other States* and avoid infringement upon their sovereignty." *Allstate Insurance Co. v. Hague*, 449 U.S. at 322 (Stevens, J., concurring). Justice Stevens amplified on this in *Allstate* when he explained that full faith and credit must be extended to prevent one State from imposing a policy that is hostile to another State's public acts:

> The kind of state action the Full Faith and Credit Clause was designed to prevent has been described in a variety of ways by this Court. In *Carroll v. Lanza*, 349 U.S. 408, 413 (1955), the Court indicated that the Clause would be invoked to restrain "any policy of hostility to the public Acts" of another State. In *Nevada v. Hall*, *supra*, at 424, n.24, we approved action which "pose[d] no substantial threat to our constitutional system of cooperative federalism." And in *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980), the plurality opinion described the purpose of the Full Faith and Credit Clause as the prevention of "parochial entrenchment on the interests of other States."

Allstate Insurance Co. v. Hague, *supra*, 449 U.S. at 323, n.10 (Stevens, J., concurring). Certainly the language that Justice Stevens used, "restrain 'any policy of hostility to

the public Acts' of another State," and the prevention of "parochial entrenchment on the interests of other States," makes it clear that a balancing test is still appropriately used in some cases, and the Board believes that such a test must be used in this case.

Respondent's brief dramatically underscores the constitutional confrontation presented by this case which goes to the very core of cooperative federalism, an issue not present at all in *Allstate*. The issue presented to the Court in this case raises numerous important constitutional questions. Is the Full Faith and Credit Clause of the United States Constitution the appropriate vehicle for resolving confrontations between and among the States over the application of choice of law questions? May a forum State extend its judicial authority beyond its geographic borders to affect the governmental policies and actions of another State thereby exposing the public officials of the non-forum State, who have little or no contact with the forum State, to its judicial scrutiny and authority? Do cooperative federalism and the need to prevent conflicts between the States require that the judicial authority of one State with respect to the governmental actions of another State be tempered by the Full Faith and Credit Clause? Are the limitations on choice of law questions especially and uniquely important to our constitutional structure in situations where the forum State, as it does here, admits that substantially all the conduct of another State that gives rise to the conflict occurred in the non-forum State? None of these questions were answered in *Allstate*; they are questions that under our constitution only this Court can answer and the answer is needed now.

Moreover, footnote 10 in *Allstate* [449 U.S. at 323], upon which respondent relies, itself cites *Nevada v. Hall*. Thus, as this Court did in *Nevada v. Hall*, the Court in *Allstate* implicitly left open the same question of revisiting the Full Faith and Credit Clause analysis when choice of law questions involving core sovereign functions are at issue.

In addition, applying respondent's view of full faith and credit to the present situation is at odds with the generally accepted view that the purpose of the Full Faith and Credit Clause was to alter the States' status as completely independent sovereigns.

Justice Scalia explained the role of the Full Faith and Credit Clause in *Sun Oil Co. v. Wortman*, where he explained the statement in *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 276-277 (1935) regarding choice of law jurisprudence: "The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties." Thus:

> This statement is true, as the context of the statement in Milwaukee County makes clear, not because the clause itself radically changed the principle of conflicts law but because it made conflicts principles enforceable as a matter of constitutional command rather than leaving the enforcement to the vagaries of the forum's view of comity. See *Estin v. Estin*, 334 U.S. 541, 546 (1948) (the Full Faith and Credit Clause "substituted a command for the earlier principles of comity and *thus* basically altered the status of the States as independent sovereigns"). . . .

Sun Oil Co. v. Wortman, 486 U.S. at 723-24, n.1; emphasis and parentheses in original.

Justice Stevens in *Allstate* also explained that:

> The Full Faith and Credit Clause is one of several provisions in the United States Constitution designed to transform the several States from independent sovereigns into a single, unified Nation.

Allstate Insurance Co. v. Hague, 449 U.S. at 322 (Stevens, J., concurring).

II. The States do need guidance in applying *Nevada v. Hall*.

Respondent contends that "forum states, applying the existing standard, are highly unlikely to allow prosecution of suits that would seriously impede necessary government activity." RB 9. Respondent also claims "that forum states are fully able to identify cases in which recognition of sovereign, or other like defenses, for a sister state is appropriate." RB 11. However, the problem here is that a forum State *has* failed to recognize an appropriate defense; thus, precisely that which respondent claims is unlikely to occur has, in fact, occurred. Respondent admits that he is challenging official conduct by Board officials *administering California's tax laws*, conduct that occurred almost exclusively in California. The Nevada Supreme Court originally found that "the myriad of depositions and documents submitted to the court are undisputed and indicate that Franchise Tax Board's investigative acts were in line with a standard to determine residency status for taxation pursuant to its statutory authority." Pet. App. 42-43. The Nevada district court observed that ninety-five percent of the conduct complained about occurred outside the forum State of Nevada. Pet. App. Ex. 17. Yet, despite

these uncontradicted facts, the Nevada Supreme Court has allow respondent to proceed under Nevada law when existing California law would provide the Board with broad immunities.[2] In this case the unexpected has occurred and only this Court can respond to it.

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[2] The Nevada district court has also allowed respondent unfettered freedom in discovery, allowing almost unlimited and draconian discovery measures affecting administrative tax and governmental records and public employees, often in contravention of existing California law. This includes sealing the court file and the imposing of an oppressive protective order designed to keep the proceeding behind a wall of secrecy. See Board Response To Errata at 2.

CONCLUSION

Based on the foregoing reasons, petitioner respectfully requests this Court to grant the Board's petition.

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